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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-306

MONTY M. STANLEY,

Petitioner,

v.

MARJORIE TAYLOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FOURTH DISTRICT

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a) THIS CASE IS REPORTED IN 4 Ill. App. 3d 98, 278 N.E. 2d 824, and said Opinion is reprinted in the Appendix hereto.

b) GROUNDS FOR JURISDICTION:

i) *The date of judgment:* May 15, 1970.

ii) *Rehearing denied:* March 7, 1972.

iii) *Petition for Leave to Appeal denied:* May 25, 1972. Stay of mandate was granted by the Illinois Supreme Court to prepare this Petition for Writ of Certiorari on June 19, 1972.

iv) *Statutory provisions conferring jurisdiction:* §1257(3) of Title 28, United States Code.

c) QUESTIONS PRESENTED FOR REVIEW:

1. Is civil trial by jury as provided in the United States and Illinois Constitutions a fundamental right protected against arbitrary abridgement by a State Judiciary?

2. Is an arbitrary decision of a State Appellate Court regarding the fundamental right of civil trial by jury a denial of due process and equal protection of the laws as applied to the States through the Fourteenth Amendment?

d) THE CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS APPLICABLE:

Seventh Amendment to the United States Constitution:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Fourteenth Amendment to the United States Constitution, Section 1:

> "Section 1: All persons born or naturalized in the United States, and subject to the

> jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

e) STATEMENT OF THE CASE:

This was an action for professional slander based upon the following statements spoken in the presence of students and teachers:

> "I think you are plain stupid, because you are unfit to be a principal of this school or any other school. You are not qualified. You are a disgrace to the profession.
>
> . . . . . .
>
> "You are just like that old Lee Harvey Oswald that shot and killed President Kennedy and that Jack Ruby who shot and killed him in Dallas; it is people like you who do what they did."

The defendant was a teacher and spoke these words about the plaintiff, a school principal. Similar accusations were made both before and after the alleged slander and resulted in termination of plaintiff's employment as principal. At the time of termination, the defendant's attorney also acted as President of the Board of Education. The plaintiff was never again hired as a principal or supervisor in any school system.

The case was submitted to a jury in the defendant's county of residence and was tried by the defendant's same family attorney who acted as President of the Board of Education. A verdict for $75,775.00 was returned and judgment entered thereon. The Appellate Court of this State, 4 Ill. App. 2d 98, 278 N.E. 2d 824 (4th District), reversed without remandment and concluded:

> "This Court has participated in reiterating what is sometimes described as the common law view, that, as a general rule, both written and spoken words falsely uttered about a person in the presence of other are slander *per se:* (1) If they impute to the person spoken of an unfitness to perform the duties of an office or employment; or (2) if they prejudice the person spoken of in his profession or trade (WHITBY v. ASSOCIATES DISCOUNT CORP., 59 Ill. App. 2d 337; 33A I.L.P., Slander and Libel, §21, p. 33). Based upon these criteria it is the contention of plaintiff that the utterances here were slander *per se,* permitting malice and damages to be implied, in that the 'first utterance' falsely accused him of unfitness to perform his duties as principal, while the 'Oswald-Ruby utterances' were 'spoken in aggravation of the words challenging his professional competency' and tended to prejudice him in his profession. In our view, this approach is not only too simplistic, but is incorrect.
>
> . . .
>
> "In our opinion the utterances under consideration in this case, as shown by the record,

do not qualify as slander *per se*. Accordingly, the trial court should have entered judgment for defendant notwithstanding the verdict pursuant to defendant's motion." (Opinion, pp. 8-9, 15)

f) THE MANNER IN WHICH FEDERAL QUESTIONS WERE RAISED:

The first stage in the proceedings in which constitutional questions arose was as a result of the action of the Appellate Court in reversing without remandment the judgment of the trial court based upon the jury verdict.

In a Petition for Rehearing filed in the Appellate Court, plaintiff pointed out that its Opinion denied his constitutional right to a trial by jury.

> "This decision . . . denies plaintiff a hearing and therefore denies due process and equal protection of the laws insured under the Constitution of the United States and State of Illinois, and denies plaintiff the right of trial by jury as insured by Section 13 of the State of Illinois and the 7th Amendment to the United States Constitution as applied to the States through the due process clause of the 14th Amendment of the United States Constitution." (Petition for Rehearing, p. 16)

ARGUMENT

I

THE RIGHT OF CIVIL TRIAL BY JURY IS A FUNDAMENTAL RIGHT INCORPORATED WITHIN THE MEANING OF DUE PROCESS AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.

In reaching its desired result, the Illinois Appellate Court Opinion completely omitted evidentiary facts establishing malice, damages and causation. An example of material contained in the record, but omitted in the Opinion, is documented below:

1) **Actual Malice:**

Prior to 1963 Virginia Community School District No. 64 had never employed a principal directly responsible for the supervision of teachers in either the High School or Grade School. In the opinion of the County Superintendent of Schools this type of supervision was needed. (R. 355-356) The defendant, Marjorie Taylor, never attained tenure in any school system before returning to her home in Virginia, Illinois, in 1954. She never worked under the supervision of a principal for longer than a single year. (R. 271-272) At the time Monty Stanley came to Virginia to accept the position of principal in the Virginia School System, he accepted supervision of all teachers under his supervision, including the defendant, Marjorie Taylor (R. 276).

Shortly after the beginning of the school year the defendant began to criticize the plaintiff and seek to obtain his dismissal as an incompetent.

Teacher, Don George:

"Q Now, would you relate to the Court any other circumstances where – well, the place where it occurred, where Miss Taylor directed any derogatory remarks concerning Mr. Stanley or his qualifications?

A Well, the one incident that I can recall occurred in a room that was used as a faculty lounge at that time, and she and Mr. Stanley undoubtedly had had an argument and was making statements to the effect that – or indicating or doubting his qualifications as principal and his ability to lead the school as principal, and that he shouldn't remain as principal.

Q Did she say anything specifically about her role?

A Just that if she could she would see him out as principal. I don't know what that would mean." (R. 75)

• • •

Teacher, Shaw Terwilliger:

"Q During that year, were you aware of some friction or hostility that existed between Miss Taylor and Mr. Stanley?

A Yes, I was.

Q And approximately during the course of the school year, when did you become aware of it?

A Well, I think I sensed it the first two weeks of school.

Q What brought this to your attention?

A Well, Miss Taylor, I know, criticized Mr. Stanley some. She thought that some of his decisions weren't right or something.

Q Did she criticize him personally as far as his background or competency was concerned?

A Would you repeat that question?

Q Did she criticize him personally as far as his competency or background was concerned?

A Yes, she did." (R. 361-362)

During this time the defendant and her family were represented by Attorney C. G. Colburn who also acted as President of the School Board for Virginia Community School District No. 64.

"Now they talk about the fact, I noticed in his opening argument here, that he wants to try me along with everybody else connected here, by saying that I happened to be the attorney for Miss Taylor's family, that I happened to be on the School Board and so forth, and now, all of you know, that with the high salaries that a School Board member draws, you couldn't afford very well to give up some clients that you have had for about twenty years

> because you were elected to the School Board, so I am not making any apologies for the fact that I have represented the Taylor family for a long time, and still do." (C. G. Colburn, Opening Statement, R. 26)

The difficulties and complaints of Miss Taylor persisted with Stanley's successors. (Testimony of Donna (Long) Fox, Employee for University of Illinois Health Department, Sidney, Illinois; former student of defendant and resident of Virginia, Illinois. R. 333-334) Since Mr. Stanley's departure, four different men have occupied the position of principal within the District. (R. 277)

2) **Circumstances Surrounding the Original Publication:**

The slanderous words were spoken in the presence of the plaintiff and several students and teachers under the plaintiff's supervision. It was also spoken within the hearing of another classroom of students.

> "Q What is the first indication that you had of any problem in the principal's office?
>
> A When I heard the voices.
>
> Q And whose voices did you hear?
>
> A Miss Taylor.
>
> Q And in your classroom, were you attempting to conduct a class and instruct?
>
> A Yes.
>
> Q Could you distinguish what was said?

A Yes. I said – when I first realized something was wrong, I heard Miss Taylor's voice, and it was loud enough – well, I don't recall offhand, whether or not – the office was built that summer, and I don't remember if the partition went all the way to the ceiling, but it was in the back corner of the classroom. I heard her voice coming from this room, and she was talking about Mr. Stanley as far as his qualifications of being a principal, and also thing of being fit to be a principal, and then also, she referred to him as comparable to Lee Harvey Oswald and Jack Ruby, in the same year of the assassination of President Kennedy.

Q And during the course of this, did you attempt to continue instructing your class?

A I tried to. As I said, I was aware of what was happening, and my students were aware of what was happening, and I lost my students, because they were interested in what was taking place, rather than what I was trying to do." (R. 90-91)

At the time of the utterance the defendant stated:

" . . . 'Well, I want to call Mr. Colburn.', and she started for my telephone. I thought this was no place to continue that in the presence of these students and teachers. I put my arm on the phone. I said, 'I will report this to Mr. Colburn in my own due time,', and I said, 'If it will help to get this

girl and you into your classroom', I said, 'I will guarantee that either you or I one will not be back next year.' I thought it would make her happy, but it did not.

Q How did she respond?

A Her words were, 'Oh, it will be you that will be gone. I will still be here, I am on tenure. You can't fire me. It will be you that will be gone.' " (Plaintiff's Testimony, R. 163-164)

3) **Republication and Aggravation:**

The allegation of incompetence was republished in pleading truth as a defense. (A. 40-41) In support of the truth of defendant's allegation of incompetence the defendant testified:

"Q You have filed an affirmative defense in this matter, Miss Taylor, and you allege after denying that you said these things – excuse me – may I have the pleadings?

Now, tell me if I am wrong; do you allege as a defense for whatever you did or said, and that will be determined by the Jury; I am quoting now, 'For a further defense to the Complaint as amended, the Defendant by her aforesaid attorney, alleges that the supposed alleged defamatory words contained in the Complaint as amended, to-wit: 'I think you are plain stupid because you are unfit to be a principal of this school or any other school. You are not qualified. You are a

disgrace to the profession', were true and were spoken in good faith and without malice. Do you allege that these things, if said were true?

A I was quite concerned, because I felt discipline was going to break down at school.

Q Do you allege that these things, if said, were true?

A In my opinion, yes.

* * *

Q Do you contend that Mr. Stanley is incompetent wherever he is or just when he is supervising you?

A I think he is incompetent as a supervisor of people. I think there are some things the man can do very well.

Q And that is regardless of whether he is in Virginia or Kansas City or wherever he is?

A That's true." (R. 273-274, 276)

and in support thereof her attorney argued:

"ATTORNEY COLBURN: . . . (Opening Statement)

Well anyway, the evidence will show that Mr. Stanley never held a job as *administrator or principal or superintendent before he came to Virginia* in 1963. The evidence, I think

will show that he probably never held one since." (R. 27) (Emphasis added)

4) **Damages:**

The defendant's statements spread throughout the school.

"Q Did you take the time to make any type of investigation as to what happened in your absence that day?

A I didn't think it was necessary, because the incident had been spread all over school, and I think that there was enough witnesses that everyone became familiar with it. At this point it had gotten out of hand anyway." (Def. Witness Rademaker, on cross-examination, R. 307)

It was also a matter of general knowledge throughout the community, including members of the School Board.

'Q The Board of Education never heard the evidence presented in this courtroom, did they, Mr. Rademaker?

A No, they didn't, if it is such evidence.

Q You and Mr. Colburn never afforded Mr. Stanley the opportunity to develop the facts in this case or bring it to the Board's attention, did you?

A When the Board of Education in a small town, this is a Board, they are doing this without pay, they are criticized for actions from time to time, and you can't

tell me that the Board of Education isn't approached by citizens and the student body, they know what is going on. This was not a –

Q Let's not talk about the Board's criticism. Let's talk about your recommendation. It was based upon incompetency in this system?

A Right.

Q And that was based upon generalities of teachers that you cannot name, and bits of gossip in corners of the school?

A No, you are putting words in my mouth. There is one other code. One other means, and that would be my day-to-day personal reaction with him. This would run into the picture too. In the event I omitted this, I am sorry, but it is part of it.

Q You do acknowledge that you picked up some of this information or rather comments around the building.

A Yes, and if an administrator doesn't do this he is not tuned in. He is not with it." (R. 309-311)

In December, immediately following the occurrence, the plaintiff made a written request through Supt. Dean Rademaker to School Board President C. G. Colburn for a hearing which was denied.

"Q What did you ask in the letter?

A I had three short paragraphs. Gentlemen: I hereby request an audience with the Board of Education at a special meeting to be called at 7:30 P.M. this date. The letter was dated December 5, 1963. Paragraph 2. This is for the purpose of discussing pertinent facts relative to a serious personnel situation involving the entire administration, faculty and student body. Paragraph Three. This letter is submitted in what is to be considered – in what I would consider in the best interests of this school district. Respectfully yours, Monty M. Stanley, Principal." (R. 171-172)

Mr. Colburn later presided over the December meeting and the minutes reflect:

PLAINTIFF'S EXHIBIT 1

"The minutes of the regular meeting of the Board of Education of Virginia Community Unit School Dist. No. 64, Cass Co., which was held on December 16, 1963 in the office of the Supt. of Schools at 7:30 P.M.

"Miss Taylor's and Mr. Stanley's fracus were discussed.

"Meeting adjourned at 9:15 P.M." (A. 84, 86)

Mr. Colburn continued in the dual capacity of defendant's attorney and President of the School Board until the April meeting, whereupon the following action was taken:

PLAINTIFF'S EXHIBIT 2

"Minutes of the regular meeting of the Board of Education of the Virginia Community Unit School Dist. No. 64, Cass Co. which was held on April 17, 1964 at 7:30 in the office of the Supt.

* * *

"The Superintendent and the Board entered a discussion as to the continuance of Mr. Stanley's contract. It was moved by Mr. Dodds and seconded by Mr. Huffman that Mr. Stanley's contract be terminated at the end of the 1963-64 school year. The motion carried unanimously. This motion was made for the best interest of the school. Roll call:

Dodds yes	Devlin, yes
Huffman, yes	Snow, yes
Reiterman, yes	Peterson, yes
Colburn, yes	

"A discussion was had by the members of the Board concerning certain matters affecting the teacher Miss Marjorie Taylor, in regard to her conduct as a teacher and the Superintendent was advised of the Board's position in the matter as discussed.

"Meeting adjourned at 9:15 P.M." (A. 86, 88)

This dismissal was the deciding factor in plaintiff losing employment in Kansas City, Missouri.

"Q What was the primary or deciding factor that caused you to recommend Mr. Richmond over Mr. Stanley, even though, as you mentioned earlier, his credentials were more impressive than Mr. Richmond's?

A . . . I always ask a question about 'why are you seeking this position?' Mr. Stanley told me at the time he was not returning to his present position that he held at that time. Naturally, I wanted to know the reasons. He told me, the best that I can recollect, is that he had had difficulty with a teacher who had caused him quite a bit of concern during his time of supervision – was apparently uncooperating to a point there was a real conflict between he and this teacher. She had called him names, and he had mentioned some of the things on which they could not agree, but I do not recall that he told me that he was fired by his Board without a hearing and the teacher retained her position.

Q *What if any, effect, did this disclosure have upon your evaluation of Mr. Stanley as a suitable candidate to be recommended to the Board?*

A During the course of the evening, I was – my Assistant Superintendent and I, were constantly trying to evaluate the relative merit of these two men for the position, *and that was the turning point in my decision.*" (R. 225, 226) (Emphasis added)

Plaintiff was repeatedly denied employment as a principal or administrator during the years following this occurrence. (A. 144-145)

5) Plaintiff's Prior Credentials and Reputation:

The plaintiff, Monty Stanley, graduated from the Illinois Commercial College in 1940 at the age of 20. (R. 152) After spending ten years in service and as a Clerk for the War Board, he returned to Eastern Illinois University with his family under the G.I. Bill where he obtained a Master's Degree in Business Education in 1953. While at Eastern University he obtained a 4.25 average on a 5 point system. He belonged to three National and International Education Societies, (R. 152).

In 1953, at the age of 33, Monty Stanley began his professional teaching career. He returned to his home town of Clay City and began teaching at Clay City Community High School. He attained tenure and taught Business Education from September, 1953, until June of 1959, when he accepted an appointment as Supervisor with the Office of the Superintendent of Public Instruction in Springfield. (R. 152)

During the years after he left Eastern University, Monty Stanley continued his education. He attended night classes in Mt. Vernon, 50 miles from his home in Flora, Illinois. He spent two summers at the University of Illinois in Champaign. In addition, he taught adult education courses at night for the Vocational Technical Institution of Southern Illinois University. (R. 152) While with the State Superintendent of Public Instruction, he taught office and management classes to State Supervisors, Department Heads and Office Engineers. (R. 152)

After two years, the plaintiff accepted a position as Assistant Business Manager of the Arlington Heights Public School in Cook County, where he gained additional experience in school administration. After two years in suburban Chicago, Monty Stanley made application for the position of Superintendent of Schools in the Virginia School District. Dean Rademaker was chosen as Superintendent, but the plaintiff was contacted and asked if he would accept the newly created position of Principal under Rademaker as Superintendent. Because of the unique position of Principal of a Unit District, including supervision of grades one through twelve, the plaintiff accepted the position and returned his contract as Guidance Director of Newton Community High School. (R. 153-155) Monty Stanley came to Virginia, Illinois, at age 43, at a decrease in salary, to occupy his first and last job as "administrator, or principal, or superintendent." (R. 27)

This Court has recently stated that the procedure followed in this case may well cause a denial of due process where a person's good name and reputation are affected.

> "There might be cases in which a State refused to reemploy a person under such circumstances that interests in liberty would be implicated. But this is not such a case.
>
> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be

a different case. For '[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. *Wisconsin v. Constantineau*, 400 U.S. 433, 437. *Wieman v. Updegraff*, 344 U.S. 183, 191; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123; *United States v. Lovett*, 328 U.S. 303, 316-317; *Peters v. Hobby*, 349 U.S. 331, 352 (concurring opinion). See *Cafeteria Workers v. McElroy*, 367 U.S. 886, 898. In such a case, due process would accord an opportunity to refute the charge before University officials. In the present case, however, there is no suggestion whatever that the respondent's interest in his 'good name, reputation, honor or integrity' is at stake.

"Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not involve any regulations to bar the respondent from all other public employment in State universities. Had it done so, this, again, would be a different case. For '[t]o be deprived not only of present government employment but of future opportunity for it is no small injury . . . .' *Joint Anti-Fascist Refugee Committee v. McGrath*, *supra*, at 185 (Jackson, J., concurring). See *Truax v. Raich*, 239 U.S. 33,

> 41. The Court has held, for example, that a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities 'in a manner . . . that contravene[s] due process,' *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238, and, specifically, in a manner that denies the right to a full prior hearing. *Willner v. Committee on Character*, 373 U.S. 96, 103. See *Cafeteria Workers v. McElroy, supra*, at 898." *Board of Regents v. Roth*, No. 71-162 ____ U.S. ____ (decided June 29, 1972) pp. B3858-B3859.

The School Board acted through defendant's attorney as its President and was an obvious denial of due process. For a Judicial branch of State government to later deny a jury trial compounds the denial of hearing such an arbitrary abuse and denies both equal protection of the law and due process. As observed by the Illinois Association of Secondary School Principals in its *amicus curiae* brief:

> "A School Board has a legitimate interest, in fact a duty, to see that only qualified teachers are retained within a system. This does not mean a Board has absolute discretion to ignore existing facts and act arbitrarily.
>
> . . .
>
> "It is significant that after the alleged slander the plaintiff was not granted fair treatment in accordance with recent constitutional decisions in the area of due process. If the plaintiff was actually slandered and this was a cause in his failure to be rehired, the damage done was compounded by the Board's

action and remains an immutable black mark upon the plaintiff's professional record.

. . .

"In this case the pressure did not arise from the community. It came from a single accusor. The accusation of incompetency was republished through a school board president and attorney representing both the accusor and the body sitting in judgment over the accused *in absentia*. This type of procedure can never afford due process nor justify the result reached." (*Amicus Curiae Brief of Illinois Association of Secondary School Principals*, pp. 9, 10, 12)

We do not presume to inform this Court as to the meaning of due process as used in the Fourteenth Amendment. This Court has come to grips with this issue more often than perhaps any other problem in modern constitutional law. However, the issue presented in this petition is unique, in that we allege a violation of the due process clause of the Fourteenth Amendment by a State Court of review. This violation is based upon an arbitrary denial of a basic and fundamental right, the right to civil jury trial. This question is unique because it is hard to envision another case where the violation is so gross and so obvious and where the violation is by the Judicial branch of a sovereign state entrusted with the equal administration of justice. We pray the Court take cognizance of the momentous implications of the action taken by the Illinois Appellate Court in denying a citizen the right to have a jury determine the merits of this controversy.

It is appropriate in petitioning this Honorable Court to exercise its discretionary writ of certiorari to note that this issue is unsettled. In the Court's own words:

> "The Court has not hesitated to reexamine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." *Malloy v. Hogan*, 378 U.S. 1, 5.

It is our contention that the right of civil trial by jury is a fundamental right, and that an arbitrary and complete denial by a State Court constitutes a denial of due process as applied to the States through the Fourteenth Amendment.

The obvious divergence of philosophy as to the meaning of due process as used in the Fourteenth Amendment is evident in the expression of both majority and minority opinions in leading cases reported over the past half century. (*Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226; *Twining v. New Jersey*, 211 U.S. 78; *Palko v. Connecticut*, 302 U.S. 319; *Adamson v. Calif.*, 332 U.S. 46; *Gideon v. Wainwright*, 372 U.S. 355; *Malloy v. Hogan*, 378 U.S. 1.)

In *Twining v. New Jersey*, 211 U.S. 78, the Court, in relying upon *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, held:

> " . . . it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law." at 99.

Later Mr. Justice Cardozo, in *Palko v. Connecticut*, 302 U.S. 319, held that certain basic provisions of the Bill of Rights might be "absorbed" within the Fourteenth Amendment if " . . . . neither liberty nor justice would exist if they were sacrificed." at 326. Thus was born the concept of "absorption" by which the Court has included selective provisions of the Bill of Rights and applied them to the States. As pointed out by Mr. Justice Douglas in *Gideon v. Wainwright*, 372 U.S. 355, 346, the doctrine of "incorporation" of all the first eight of the Amendments has been advocated by many Justices, past and present, to insure uniform application of the fundamental freedoms enumerated in our Bill of Rights. However, this issue was squarely joined in *Adamson v. California*, 332 U.S. 46, and resolved by a 5 to 4 decision that there is no blanket incorporation of the Bill of Rights in the Fourteenth Amendment.

The question is then presented: Is civil jury trial a right protected from arbitrary denial by a State through the due process clause of the Fourteenth Amendment? Although we subscribed to the "absorption" philosophy, we do not rest our case on the Seventh Amendment alone. While it is persuasive to argue that because a specific right is expressly enumerated in our Bill of Rights, it therefore should be applied to the States through the due process clause of the Fourteenth Amendment; it is even more compelling to show that this right was deemed as basic by our Founding Fathers and Framers of our Constitution and therefore was included as a substantive right.

We contend that the right of civil jury trial is "absorbed" into the meaning of due process because it is a basic and fundamental right, and further that it is "implicit in the concept of ordered liberty' as defined in *Palko v. Connecticut*, 302 U.S. 319, 325.

As recently observed by this Court in including right to a jury trial in criminal cases:

> "That clause now protects the right to compensation for property taken by the State;[4] the rights of speech, press, and religion covered by the First Amendment;[5] the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized;[6] the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination;[7] and the Sixth Amendment rights to counsel,[8] to a speedy[9] and public[10] trial, to confrontation of opposing witnesses,[11] and to compulsory process for obtaining witnesses.[12]" *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968)

Compiled below are individual and documentary testimonials as to the basic and fundamental nature of civil jury trial as expressed at the time of the formation of this nation.

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4 *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).

5 See, *e.g.*, *Fiske v. Kansas*, 274 U.S. 380 (1927).

6 See *Mapp v. Ohio*, 367 U.S. 643 (1961).

7 *Malloy v. Hogan*, 378 U.S. 1 (1964).

8 *Gideon v. Wainwright*, 372 U.S. 335 (1963).

9 *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

10 *In re Oliver*, 333 U.S. 257 (1948).

11 *Pointer v. Texas*, 380 U.S. 400 (1964).

12 *Washington v. Texas*, 388 U.S. 14 (1967).

* * *

Documentary:

"He (the King of England) has combined, with others, to subject us to a jurisdiction foreign to our Constitution, and unacknowledged by our laws; giving his assent to their Acts of pretended Legislation . . . for depriving us of the benefit of Trial by Jury." (*Declaration of Independence* (1776))

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." (*Constitution of the United States, Seventh Amendment*)

"The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there be any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government." (*Federalist* No. 83)

"That in controversies respecting property, and in suits between man and man, the ancient trial by Jury is one of the greatest Securities to the rights of the people, and ought to remain sacred and inviolable. Twelfth. That every freeman ought to find a certain

remedy by recourse to the laws for all injuries and wrongs he may receive in his person, property or character. He ought to obtain right and justice freely without sale, completely and without denial, promptly and without delay, and that all establishments or regulations contravening these rights, are oppressive and unjust." (*Ratification of the Const. of the U. S., State of Virginia*)

"That the trial by jury in the extent that it obtains by the Common Law of England is one of the greatest securities to the rights of a free People, and ought to remain inviolate." (*Ratification of the Constitution of the U.S., State of New York.*)

Individual:

Thomas Jefferson:

"I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." 3 *Writing of Thomas Jefferson* (Washington ed.) 71."

Alexander Hamilton:

" . . . jury verdicts should be re-examined, if at all, only by a second jury, either by remanding the cause to the court below for a second trial of the fact, or by directing an issue immediately out of the Supreme Court."

Patrick Henry:

" . . . Trial by jury is the best appendage of freedom . . . We are told that we are to

> part with that trial by jury with which our ancestors secured their lives and property. . . I hope we shall never be induced, by such arguments, to part with that excellent mode of trial. No appeal can now be made as to fact in common law suits. *The unanimous verdict of impartial men cannot be reversed."* (Emphasis added)

James Madison, the Father of our Constitution, defined the court's role in protecting this and other freedoms enumerated in our Bill of Rights:

> "Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; . . . they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the Declaration of right."[1]

The *Duncan* case reiterated this position as to the importance of a jury trial within contemporary standards of due process:

> "Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan v. Louisiana,* 391 U.S. 145, 156 (1968)

The first case to relate the due process clause of the Fourteenth Amendment to the basic rights enumerated in the Bill of Rights was *Chicago, B. & Q. R. Co. v. Chicago,*

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(1) We are indebted to Mr. Justice Black's historical documentation in his dissent in *Galloway v. United States,* 319 U.S. 372, for the above individual quotations.

166 U.S. 266. In deciding whether or not a taking of property without just compensation constituted a denial of due process the Court came to grips with the meaning of the Seventh Amendment as applied to the Federal Courts. After recognizing that it could review only questions of law it concluded:

> "Even if we were of opinion in view of the evidence that the jury erred in finding that no property right, of substantial value in money, had been taken from the railroad company by reason of the opening of a street across its right of way, we cannot on that ground, re-examine the final judgment of the state court. We are permitted only to inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation."

The Court however made this statement:

> "In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest ocurt of the state is a denial by that state of a right secured to the owner by that instrument."

If such a judgment based upon a jury finding would deny due process for failure to pay just compensation for property

taken, would not a judgment that arbitrarily reverses a jury finding for professional slander constitute a denial of due process under the Fourteenth Amendment?

Even allowing for a state's divergence in philosophy inconsistent with our Founding Fathers and the Federal Constitution, we find Illinois to be no free experimenter in the elimination of basic rights. Her new 1970 Constitution providing for civil jury trials remains unchanged. Her Statutes contain no revolutionary procedure indulging such practice. Her courts previously have recognized the mandates of a Constitutional system and its protection of the jury system.

> "In our opinion section 120 of the Practice Act was intended only to apply to cases where a jury was waived in the trial court by agreement of the parties, or where tried by jury the trial court would have been justified in directing a verdict because the evidence did not tend to establish a cause of action but refused to do so . . . . But if the statute be construed to confer on the Appellate Court the same functions exercised by a jury in a trial court, such construction would render it unconstitutional, as depriving a party of the constitutional right to trial by jury. As applied to cases which in our opinion it was intended to apply, it would not be unconstitutional." *Mirich v. Forschner Contracting Co.*, 312 Ill. 343, 357.

Former Justice Black has long championed the right of both civil and criminal jury trial and in the February issue of the Yale Law Journal in commemoration of his 70th birthday, Professor Leon Green traced briefly the history

of civil jury trial and Mr. Justice Black's position. In a closing footnote Professor Green noted:

> "35. Fortunately there are other devoted guardians of jury trial and of the integrity of trial courts to be found in the state and federal systems. Outstanding among these is Justice Carter of the California Supreme Court, whose opinions are probably unequaled for thier sturdy advocacy of jury trial. And the scholarly and articulate Judge Jerome Frank of the Second Circuit, although he would like to see jury trial eliminated by constitutional amendment, at least in civil cases, never ceases to urge the overwhelming importance of the *facts* in every litigation, and the exclusive power of the jury, under existing constitutional provisions, to evaluate the facts. *Skidmore v. Baltimore & O.R.R.*, 167 F.2d 54 (2d Cir. 1948); *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 665 (2d Cir. 1946). But such judges are rare and they may well be the last great judges who intelligently fight the battle for the jury. For the power of organization, the volume and haste of the flow of business, and the mesh of doctrines are steadily and remorselessly taking jury trial (except for the formality) out of play as a mechanism for the protection of the individual's rights in civil matters." *The Yale Law Journal, Volume 64*, February, 1956, Number 4, *Jury Trial and Mr. Justice Black*, by Leon Green, p. 494, footnote 35.

This Court has by a process of absorption gradually expanded the concept of due process to incorporate the major provisions of the first eight Amendments to our Federal Constitution. It is academic to argue whether or not the right of civil jury trial is included under the meaning of the due process clause of the Fourteenth Amendment by a process of "incorporation," "absorption" or embraced within the concept "implicit in our system of ordered liberty." The fact remains that it is a basic and fundamental right protected in both the Federal and Illinois Constitutions and ingrained in our Anglo-American common law concept of impartial adjudication. Mr. Justice Black, in his dissent in *Adamson v. Calif.*, 332 U.S. 46, 89, pointed out that our Bill of Rights and its provisions ". . . may be thought outdated abstractions by some," and concluded, "To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution."

More recently this Court has stated that the right to a jury in criminal proceedings does not require a common law panel of twelve. In so doing the Court implied that the guarantees of the 7th Amendment were yet to be passed upon.

> "30. Similarly, cases interpreting the jury trial provisions of the Seventh Amendment generally leap from the fact that the jury possessed a certain feature at common law to the conclusion that that feature must have been preserved by the Amendment's simple reference to trial by 'jury.' *E.g., Capital Traction Co. v. Hof*, 174 U.S. 1, 13-14 (1899); *American Publishing Co. v. Fisher*, 166 U.S. 464, 468 (1897). While much of our discussion

> in this case may be thought to bear equally on the interpretation of the Seventh Amendment's jury trial provisions, we emphasize that the question is not before us; we do not decide whether, for example, additional references to the 'common law' that occur in the Seventh Amendment might support a different interpretation. See *infra*, at 97 and n. 44." *Williams v. Florida*, 399 U.S. 78, 92 (footnote 30).

In this case the plaintiff proved the alleged statements, as acknowledged in the Illinois court's opinion. Under the common law of Illinois and all antecedent Anglo-American jurisprudence, the words themselves are actionable *per se*. To reverse without remanding a jury verdict, is to deny plaintiff equal protection of the laws. To deny the plaintiff a hearing for redress, is to deny due process. To deny plaintiff his right to a jury trial upon an actionable cause, properly pleaded and supported by evidence, is a judicial usurpation of his rights under the Seventh Amendment as applied to the States through the equal protection and due process clauses of the Fourteenth Amendment.

II.

A STATE JUDICIARY CANNOT ARBITRARILY DENY ITS CITIZENS A FUNDAMENTAL RIGHT WITHOUT VIOLATING THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

It has often been held that mere error by a State court does not constitute a denial of due process. *Beck v. Washington*, 369 U.S. 541. This rule has been applied even though it may be contrary to previous expressions by the same Court. However, this Court has indicated on several

occasions that if the error is so gross and obvious as to approach arbitrary action, the decision itself constitutes a denial of due process by the Judiciary. With reference to condemnation proceedings by a State, Mr. Justice Cardozo distinguished between mere error and arbitrary rulings by a tribunal.

> "To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitray action." *Roberts v. New York*, 295 U.S. 264, 277.

In addition to the arbitrary test, the Court has also intimated that an erroneous decision may constitute a denial of due process if it affects fundamental principles established in our system or jurisprudence.

> "We cannot interfere unless the judgment amounts to mere arbitrary or capricious exercise of power, *or is in clear conflict with those fundamental 'principles which have been established in our system of jurisprudence for the protection and enforcement of private rights.'* " *American Railway Exp. Co. v. Kentucky*, 273 U.S. 269, 273. (Emphasis added)

Thus, if the decision is itself arbitrary *or* in conflict with a fundamental principle of jurisprudence, it is violative of due process. What is more fundamental than the ancient Anglo-American concept of jury trial in the adjudication of private civil litigation? The fact that it was included as a basic and fundamental right in our Federal Constitution and in virtually every State is the most eloquent testimonial of its importance in our philosophy and system of government.

The above cases considered only the proposition as to whether or not the erroneous nature of the decision itself constituted a substantive denial of due process. We are not seeking mere review of an erroneous decision, but protection of a basic and fundamental right. The right of civil trial by jury is an inherent procedural right to submit disputed questions of fact to one's peers. This decision involves more than mere error in the result. It constitutes a basic denial of what has always been considered to be an essential right in civil proceedings. Therefore, this decision of the Illinois Appellate Court denies the petitioner property without due process of law in both the procedural and substantive sense. It is error both in form and result. This error is gross and obvious and therefore arbitrary on its face.

CONCLUSION

Your petitioner prays that the Court grant Writ of Certiorari to the Appellate Court of Illinois, Fourth District, and reverse the judgment of that Court and remand the cause with directions to reverse the judgment of the Appellate Court, Fourth District, of Illinois, and to affirm the judgment of the Circuit Court, Eighth Judicial Circuit of Illinois, Cass County, Virginia, Illinois.

Respectfully submitted,

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APPENDIX

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 11436

Monty M. Stanley, *Plaintiff-Appellee*	)	
	)	Appeal from
vs.	)	Circuit Court
	)	Cass County
Marjorie Taylor, *Defendant-Appellant*	)	

MR. JUSTICE ALLOY delivered the opinion of the court:

Defendant Marjorie Taylor appeals from a verdict and judgment rendered against her for the sum of $75,775 in the slander action instituted by plaintiff Monty M. Stanley in the Circuit Court of Cass County.

When the incident occurred which gave rise to the present action, plaintiff was principal of Virginia High School, Virginia, Illinois, and defendant was a teacher in the same school. Plaintiff, who had no previous experience as a principal, had been employed by the school in August, 1963, while defendant had been a teacher there since September, 1954. On the evening of December 2, 1963, the mother of defendant suffered a stroke and defendant sat up in a hospital for almost all of the night. She was called away from the school to the hospital the following morning, but returned and held her afternoon history class after which she again left the school and went to the hospital. Her movements in and out of the school, it appears,

were not coordinated with plaintiff and there was uncertainty among the students as to whether her afternoon class would be held.

The day following, December 4, 1963, at the opening of her history class at 1:05 P.M., defendant sent a girl student to plaintiff's office, adjacent to the classroom, to obtain an "admittance slip," inasmuch as the student had been absent from the prior day's class. She was absent, it appears, because she had spent the time in the school gymnasium assisting a coach in the painting of a decoration. When the student came back to the classroom without the slip, defendant accompanied her back to plaintiff's office. Several persons were present in the office at the time, and it was further testified that loud voices in the office could be heard in nearby classrooms.

While numerous witnesses gave their version of what transpired and was said, we find it necessary for purposes of this opinion to detail only the substance of plaintiff's testimony. According to him, he was not certain whether the student was to have an "admit" slip or a "tardy" slip, and while he was discussing it with the student, defendant entered his office, started beating her fist on his desk and stated: "Mr. Stanley, I want you to know, did you ever see anything more ridiculous in your life than this girl down in the gym drawing a picture of a silly old red bird for the coach when she should have been in my history class?" Plaintiff stated that he did not reply, and that defendant next said: "I would like to know what this school system is coming to, anyway you are the poorest excuse for a principal I have ever seen in my life. You sit there all day long and write excuse after excuse. Excused. Excused. Excused. That's the only word you know how to write. In fact, I think you are plain stupid

when you will sit and allow things like this to take place. In fact you are not qualified to be a principal. I have checked your record. You are a disgrace to the profession." These words shall hereinafter be referred to as the "first utterance."

After an exchange of words about taking the matter up with the school superintendent, and also reporting it to a member of the school board, plaintiff said he "would guarantee" that either he or defendant would "not be back next year," and to this defendant is said to have replied that it would be plaintiff who would be gone. At about this time one of the other teachers in the office remarked that defendant "had been under an awful strain" and "needed a rest," and, at this, plaintiff testified to an exchange of words as follows: "She said, 'What did you say to me all day yesterday in sympathy about my mother in the hospital?' I said: 'Miss Taylor, I didn't know who was in the hospital until Mrs. Gutekunst told me the one was your mother.' She said: 'I shouldn't have had to have told you. Everyone else knew it.' Again, she said: 'I still want to know. Did you ever see anything more ridiculous than this girl down in the gym drawing a picture of a silly old redbird for a coach when she should have been in my U.S. History class?' I said: 'Yes, Miss Taylor, I do know something more ridiculous.' I said: 'You left your classroom yesterday. You left the town without my knowledge as principal of this school district in full charge of administration in absence of the superintendent." Then is when she said: 'You are just like that old Lee Harvey Oswald that shot and killed President Kennedy, and that old Jack Ruby who shot and killed him in Dallas.' I stood up and said: 'Miss Taylor, I may not be able to get you fired, but I'm taking this before the Board

of Education. I'm going to recommend revocation of your teaching certificate, and I'm going to push it all the way, because I don't think a teacher like you, that will talk and act like you are acting in the presence of these students has any business in a classroom.' Mr. Henderson and Mrs. Gutekunst, at that point, got her out of the office."

Continuing with the testimony of plaintiff, he stated that he then stepped to the door of defendant's classrom and told the students to be quiet until their teacher could return. He then apparently encountered defendant in an area we take to have been in a corridor outside the classrom and she reportedly stated: "I said it. I'm glad I said it and I say it again. You are nothing but a Lee Harvey Oswald and a Jack Ruby." Plaintiff testified that he then decided to monitor defendant's class, although he had never done so before, and while he was in her classrom he said to her: "I would like to get one thing straight. Did you compare me with Lee Harvey Oswald and Jack Ruby in Dallas, Texas?", to which she replied: "That's right, you did. The one that shot and killed the President, and the other shot and killed the other. It is people like you who think and act the way you think and act, that causes them to do all they did." The references to Oswald and Ruby shall hereinafter be referred to, collectively, as the "Oswald-Ruby" utterances.

We interject, in passing, that no witness testified precisely to having heard the utterances as testified to by plaintiff. In varying degrees, however, some corroborated in substance that the Oswald-Ruby comparison had been made, and that defendant had questioned plaintiff's qualifications as principal. Defendant testified she could not remember what was said, and others testifying in her behalf stated they did not hear the utterances attributed to her, although in a position to do so.

The original complaint was filed November 23, 1964, and after long pleading delays the cause came to trial on the issues formed by a third amended complaint of two counts, and defendant's answer and affirmative defenses thereto. Both counts pleaded the "first utterance" in words substantially the same as plaintiff's testimony, and both also pleaded what appears to be a selected composite taken from the three "Oswald-Ruby utterances." Count I was based on a theory that both utterances were slander *per se,* while Count II was predicated on a theory that they were both slander *per quod* and alleged special damages. The distinction between the two theories is succinctly set forth in 33A I.L.P., Slander and Libel, §11, at Page 24, where it is said:

> "Defamatory words may be divided into those words which are actionable per se, and those which are actionable per quod. The difference between defamatory words actionable per se and those which are actional per quod is that in those words which are actionable per se damages need not be specially proved and malice will be implied, whereas in those words which are actionable per quod only, malice and damages must be proved.
>
> "A publication is libelous per se if it is so obviously and naturally hurtful to the person aggrieved that proof of injurious character can be, and is, dispensed with. Words actionable per quod are those which require an innuendo to give them a slanderous or libelous meaning and require evidence to show that as a matter of fact some substantial injury has followed from their use."

See also: *Whitby v. Associates Discount Corp.*, 59 Ill. App. 2d 337; *Ward v. Forest Preserve Dist.*, 13 Ill. App. 2d 257.

At the conference on jury instructions plaintiff was permitted to file a fourth amended complaint which, for all practical purposes, was substantially the same as the third amended complaint, the only notable exception being that Count I prayed for punitive damages as well as general damages. (Since only a general verdict was returned, it is not possible to determine what part of the $75,775.00 verdict, if any, was awarded as punitive damages.) Plaintiff made an election to proceed only on Count I (slander *per se*), and as a consequence, the jury was instructed only on the issues thereunder. Following the unfavorable verdict, defendant filed a post-trial motion, subsequently denied, wherein she prayed that the judgment entered on the verdict be set aside and for judgment notwithstanding the verdict on grounds, *inter alia*, that the utterances were not actionable; that they were not slander *per se;* and that plaintiff failed to prove his case. The initial contentions of defendant on this appeal are essentially the same.

The defendant also contends on appeal that the trial court erred in its ruling on certain objections to evidence and on motions to strike testimony; that it was error to give certain of plaintiff's instructions and to refuse certain of defendant's instructions in view of instructions on the theory of both slander *per se* and slander *per quod* since the case was submitted solely on the theory of slander *per se;* that it was error to permit plaintiff to inject the issue of punitive damages in the trial after the *voir dire* examination of the jury and in absence of proof of actual damages resulting to plaintiff from the words allegedly uttered by defendant; that the verdict was so excessive as to be

obviously the result of passion and prejudice and was not supported by the evidence. While we would tend to agree with certain of defendant's contentions as to trial errors if this cause were to be remanded, we believe, however, that on the record before us we are first required to determine whether the record justifies entry of judgment on the basis that slander *per se* was properly alleged and proven.

This Court has participated in reiterating what is sometimes described as the common law view, that, as a general rule, both written and spoken words falsely uttered about a person in the presence of others are slander *per se:* (1) If they impute to the person spoken of an unfitness to perform the duties of an office or employment; or (2) if they prejudice the person spoken of in his profession or trade (WHITBY v. ASSOCIATES DISCOUNT CORP., 59 Ill. App. 2d 337; 33A I.L.P., Slander and Libel, §21, p. 33). Based upon these criteria it is the contention of plaintiff that the utterances here were slander *per se,* permitting malice and damages to be implied, in that the "first utterance" falsely accused him of unfitness to perform his duties as principal, while the "Oswald-Ruby utterances" were "spoken in aggravation of the words challenging his professional competency" and tended to prejudice him in his profession. In our view, this approach is not only too simplistic, but is incorrect.

Looking first to the Oswald-Ruby utterances, it is to be observed that the common law does not give a right of action for all spoken words, even though they may be vituperative, derogatory and disparaging terms of abuse (WRIGHT v. F.W. WOOLWORTH CO., 281 Ill. App. 495, 498). In our opinion these utterances, one of which was somewhat deliberately induced by plaintiff, were no more than

heated "name-calling" which would be understood as such, and which had no tendency to defame plaintiff in his profession or to cause him to be looked upon with contempt, and for which no cause of action would lie (SKOLNIK v. NUDELMAN, 95 Ill. App. 2d 293). At the very most, it is manifest that the Oswald-Ruby utterances were not actional as slander *per se*, "In order to make words, either written or spoken of or concerning one engaged in a particular calling, actionable *per se*, they must have been used of the party in relation to his or her occupation" (CAMPBELL v. MORRIS, 224 Ill. App. 569, 572; and see: WRIGHT v. F. W. WOOLWORTH CO., 281 Ill. App. 495; REED v. ALBANESE, 78 Ill. App. 2d 53, 61). The Oswald-Ruby utterances were not specifically spoken of plaintiff in relation to his profession and, accordingly, were not actionable *per se* nor sufficient to support the jury's verdict.

In considering the first utterance we must observe that the gravamen of an action for defamation is not the injury to the plaintiff's feelings, but damage to his reputation in the eyes of other persons (33A I.L.P., Slander and Libel, §11, p. 23). It has also been declared that while defamatory matter, printed and published, may be actionable *per se*, the same words, orally spoken, would not be so, except as they occasion special damage (HOTZ v. ALTON TELEGRAPH PRINTING CO., 324 Ill. App. 1; WARD v. FOREST PRESERVE DIST., 13 Ill. App. 2d 257).

As stated in 50 American Jurisprudence 2d, Libel and Slander, §12:

> "In determining whether defamation is actionable per se, without the pleading and proof of special damages, a distinction is drawn by many courts between written and spoken

> words, so that much that, when spoken, is not actionable without an averment of extrinsic facts or an allegation and proof of special damages, is, when written or printed, actionable per se. The courts base the distinction upon an alleged difference in the inherent characteristics of the two classes of imputations, it being said that the presumption that words are defamatory arises much more readily in cases of libel than in cases of slander. It has frequently been asserted, to explain the distinction, that written defamation is much more extensively and permanently injurious to character than verbal defamation, since it is more widely circulated; that it is, therefore, more aggravated and dangerous, as tending to breaches of the peace; and that the deliberation necessary to prepare and circulate a libel evinces greater malice in the defamer and is worthy of stricter punishment."

As we have noted, words which are in written or printed form are susceptible of wider circulation and hence capable of inflicting greater injury than those which are merely spoken. Defamation made in writing or print necessitates some measure of deliberation and so by its very nature imputes an evil or other devious intention in the writer (WRIGHT v. F. W. WOOLWORTH CO., 281 Ill. App. 495, 498).

While we have had occasion to review some of the principles, to which we have referred, relating to actions of libel *per se* in cases which were decided in this Court involving alleged written defamations (WHITBY v. ASSOCIATES DISCOUNT CORP., *supra*), we have noted certain observations

respecting the distinction between libel and slander and have indicated that we might have been inclined to accept the distinction as the better rule (MITCHELL v. PEORIA JOURNAL-STAR, 76 Ill. App. 2d 154, 159). We have referred to the distinctive treatment of slander and libel because it underscores the necessity of very careful analysis by the courts of oral statements asserted to be slanderous *per se*. Heretofore, we have had no specific case to determine, in which the record required that we test certain oral statements by reasonable analysis to determine if the statements could logically be classified as slanderous *per se*. The cause before us, however, we believe, illustrates the type of case in which a court should be required to examine very closely into the entire record surrounding the making of the alleged oral statements which are contended to be actionable *per se*, and as a result of which it is contended there is no requirement for any proof of special damage. As a consequence, we have noted that the criticisms specifically leveled against the principal by the teacher in the conversation between them emphasized that all the teacher thought the principal did was "write excuses" and that by reason thereof defendant stated that plaintiff was "not qualified" to be a principal and that he was "a disgrace" to the profession. We have noted that the defendant at the time was nervous and overwrought by reason of lack of rest and apprehension about her mother's health. We have also noted that apparently what evoked the most heated reaction from plaintiff was defendant's response involving the assertion of the so-called Oswald-Ruby statement which, likewise, was apparently a hysterical outburst seeking to characterize plaintiff for not having consideration for defendant's mother. We note that thereafter plaintiff himself then talked about having defendant fired and that he would recommend revocation of her teaching certificate.

Taking plaintiff's testimony as true, and as a basis for our consideration, we have particularly noted that the exchange between plaintiff and defendant took place with very few persons within hearing, and that the statements made by defendant were spoken in a rather hysterical manner and under circumstances which would make it apparent to the observer that what was said was nothing more than an irrational argumentative characterization not worthy of serious consideration. While portions of the first utterance went beyond mere name-calling, and included reference to plaintiff in relation to his profession, we do not believe that the words were actionable *per se* under the circumstances of this case. This is not a situation where defendant made a deliberate communication to someone other then plaintiff such as the superintendent of schools or a similar individual with the direct intention of doing injury to plaintiff in his position and profession. As the record shows, the outburst was spontaneous and made directly to plaintiff and was obviously more thoughtless than anything else, and a considered evil intention to defame is not easily imputed therefrom. The entire incident stemmed from what started out as a criticism by defendant of plaintiff's policy of excusing students from class to engage in extra-curricular activities. Defendant was a teacher with an interest in the proper functioning of the school and she was entitled to make fair criticism and comment in the area which she began to discuss. What transpired after that taken on the character of mere verbal abuse in which first the defendant and then the plaintiff charged each other with professional incompetence. We conclude that the exchange did not do damage to plaintiff's professional reputation in the eyes of the persons who happened to be in position to hear and actually reflected adversely more on defendant as a result of her hysterical utterances.

Each utterance would obviously be accepted by the other persons for what it was – simply "give and take" remarks in a personal quarrel between the participants. The record in this case shows no evidence of damage to plaintiff as a consequence of the making of these statements.

Are we to say that any unguarded oral utterance made in the heat of an argument, if it contains words affecting fitness for the profession of a complainant, qualifies in all cases as slander *per se* and excuses the necessity of alleging and proving special damage, and likewise authorizes a jury to penalize a defendant with punitive damages solely on the strength of such an utterance irrespective of the circumstances? We do not believe that this is or should be the law. In our opinion the utterances under consideration in this case, as shown by the record, do not qualify as slander *per se*. Accordingly, the trial court should have entered judgment for defendant notwithstanding the verdict pursuant to defendant's motion.

Therefore, for the reasons stated, the judgment of the Circuit Court of Cass County is reversed.

JUDGMENT REVERSED.

STOUDER, P.J. and SCOTT, J., concur.